DATE: April 28, 1995

CASE NO.: 93-INA-00274

In the Matter of:

MARTIN LARA PLUMBING CORPORATION,
Employer

On Behalf of:

AGUSTIN N. SOLIS,
Alien

Appearance: Reverend Robert Vitaglione
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 2, 1990, Martin Lara Plumbing Corporation ("Employer") filed an application for labor certification to enable Agustin N. Solis ("Alien") to fill the position of Pipe Cutter (AF 8). The job duties for the position are, "[o]perates machine to cut, thread and ream pipes and assembles same according to builders' plans. Applies pipe sealing gunk."

The requirement for the position is six months of experience in the job offered.

The CO issued a Notice of Findings on December 10, 1992 (AF 66-70), proposing to deny certification on the grounds that there are U.S. workers available who are able, willing, and qualified for the job. Specifically, the CO found that the Employer did not make reasonable enough recruitment efforts to contact two U.S. applicants, Correa and Trochia, by only making one telephone call to each, which they did not return (AF 67). Additionally, the CO found that the Employer's rejections of three U.S. applicants, Marshall, Kascle, and Just, are ". . . groundless given the credentials they presented for the job at hand, especially without benefit of interviews." (AF 67). The CO stated that the Employer, if it continues to rely on lack of "fieldwork" and/or "blueprint knowledge" to sustain these three rejections, must indicate these requirements on the application and document their relevance/business necessity for the performance of the job opportunity (AF 67). Next, the CO found that the Employer failed to provide post-referral results for one U.S. applicant, Candelario (AF 66). Finally, the CO found that the Employer hired the Alien for this position without the experience and/or training now expected from U.S. workers; *i.e.*, blueprint and/or field knowledge (AF 66).

Accordingly, the Employer was notified that it had until January 14, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, received on January 11, 1993 (AF 71-77), the Employer contended that rejections of all U.S. applicants were justified. The Employer stated that U.S. applicants Candelario and Just were not qualified as they expressed no capability to read blueprints as specified in the job description. The Employer stated that U.S. applicants Marshall, Trochia, and Kascle were not qualified because they had no experience in pipe cutting. The Employer stated that U.S. applicant Correa was contacted by telephone, but failed to return the call.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

A Second Notice of Findings was issued on January 22, 1993 (AF 78-85), again proposing to deny certification. The CO found that the Employer's insistence on pipe cutting experience to the exclusion of experience as a plumber is without merit as plumbing experience is viewed to be qualifying for pipe cutting duties (AF 84). Additionally, the CO found that the job description makes no mention of a requirement of blueprint reading (AF 84). The CO also found the rejections of U.S. applicants Correa, Trochia, Marshall, Kascle, Just, and Candelario not to be for lawful, job-related reasons (AF 80). Finally, the CO finds that the Alien did not have experience/training in blueprint reading and/or field knowledge at the time of his hire (AF 78). Accordingly, the Employer must fully document why it is not feasible for him to accept someone else at this time with similar qualifications, or he may submit evidence which clearly shows that, when hired, the Alien had the qualifications the Employer is now requiring, or the Employer may make clear that his requirements do not include that which the Alien did not have when hired (AF 78).

Accordingly, the Employer was notified that it had until February 26, 1993, to rebut the findings or to cure the defects noted.

In its second rebuttal, received on February 22, 1993 (AF 86-100), the Employer contended that the CO's assumption that a person with experience in an "elevated" position has all the requisite experience needed to undertake a more inferior one is faulty (AF 100). Additionally, the Employer stated that "[a]pplicant Correa was deemed qualified by the employer but repeated phone calls produced no response from applicant." The Employer contends that an employee who cannot be reached by telephone is undesirable to the Employer because the need to shift employees to different job projects demands that the Employer be able to reach the employee by telephone (AF 99). The Employer also contends that the job title "clearly involves the compliance with project directions," and that when asked by the state agency whether blueprint reading was required, the Employer answered affirmatively (AF 99).

The CO issued the Final Determination on February 26, 1993 (AF 101-106), denying certification because:

> (1) the Employer has not satisfactorily documented why it is not now feasible to train/accept a U.S. worker as he trained/accepted the Alien or to submit evidence that the Alien had the experience at the time of his hire or to reduce/amend the experience requirement to that which the Alien had at the time of his hire;
> (2) the Employer has not rebutted the finding that plumbing experience is a related career progression step above the pipe cutter occupation and includes pipe cutting experience;
> (3) the Employer has failed to establish that dedicated pipe cutting experience to the exclusion of plumbing experience was founded in business necessity;
> (4) the Employer has demonstrated a distinct absence of diligent recruitment efforts; and,
> (5) the Employer has not made blueprint reading a requirement, has not documented a business necessity for the job function, has not identified it as a condition to the satisfactory performance of job duties, and has not justified the requirement.

The CO concluded that the Employer has not documented that the rejections of U.S. applicants were *bona fide*, resulting from lawful, job-related reasons, illustrating a distinct lack of good-faith

recruitment effort in consideration of the U.S. workers, and none of these applicants have been established to be unqualified, unavailable, or uninterested in the job opportunity (AF 101).

On March 9, 1993, the Employer requested review of the Denial of Labor Certification (AF 107-118), and the CO, on May 3, 1993, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

At the outset we note our agreement with the CO's general conclusion that the Employer has demonstrated a distinct absence of diligent recruitment efforts. As such, this application could be denied on a number of grounds. This decision will, however, focus on only two grounds.

Section 656.21(b)(5) provides:

> *The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.*

Section 656.21(b)(6) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien. Thus, the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

The CO correctly found that the Alien did not possess the required six months of experience as a pipe cutter prior to his hire (AF 104). The Alien did have experience as a plumber (AF 8), however, the Employer has rejected that experience as being qualifying, and indeed rejected U.S. applicants with such experience. Therefore, the CO properly required the Employer to document why it is not now feasible to accept a U.S. worker without experience the Alien also lacked upon hire (AF 78). The Employer simply does not address the CO's finding, and as such, certification was properly denied on that ground alone.

Further, it is not disputed by the Employer that applicant R. Correa has eight years of qualifying experience as a pipe cutter. Instead, the Employer maintains that the applicant failed to return phone calls. Nevertheless, the Employer made no effort to contact the applicant by any other means, such as certified mail.

It is well established that in order to establish good-faith recruitment, an employer has an obligation to try alternative means of contact. *Yaron Development Co., Inc.*, 89-INA-178 (Apr. 19, 1991) (*en banc*). See also, *L.G. Manufacturing, Inc.*, 90-INA-586 (Feb. 5, 1992). See also, *Ceylion Shipping, Inc.*, 92-INA-322 (Aug. 30, 1993); *Roma Ornamental Iron Works, Inc.*, 92-INA-394 (Aug. 26, 1993); *Delmonico Hotel Co.*, 92-INA-324 (July 20, 1993); *Gilliar Pharmacy*, 92-INA-3 (June 30, 1993) (made only unanswered phone calls; no letters mailed);

Surrey Transportation, Inc., 92-INA-241 (June 2, 1993); *William Martin*, 92-INA-249 (June 2, 1993); *Allcity Auto Repairs*, 91-INA-8 (Mar. 24, 1993) (left only an unanswered message); *Warmington Homes*, 91-INA-237 (Mar. 22, 1993); *Wells Laboratories, Inc.*, 92-INA-162 (Mar. 12, 1993); *Almond Jewelers, Inc.*, 92-INA-48 (Mar. 8, 1993); *Fragale Baking Co.*, 92-INA-64, 65 (Feb. 23, 1993); *MVP Corp.*, 92-INA-58 (Feb. 1, 1993).

The Employer has not established a good-faith effort to recruit where it does no more than make unanswered phone calls where an applicant's address is in the record. Under these circumstances, a certified letter would have been a minimally acceptable effort. The Employer did not make that effort, but instead has demonstrated a distinct absence of diligent recruitment efforts.

Therefore, we find that the application was properly denied for this reason as well.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.